UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 513

Case No. 538: BARABAS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Samar Sen; Mr. Luis de Posadas Montero;

Whereas, at the request of Frank Barabas, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 29 December 1989 and 30 January 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 30 January 1990, the Applicant filed an application, containing the following pleas:

"II. Pleas

10. The Applicant respectfully requests the Administrative Tribunal to make the following findings as well as to take the following decision:

(a) To find that the Joint Appeals Board erred when it decided that the Applicant's appeal did not fall within its competence;

(b) To find that the first round of the 1988-89 Professional selection process in the Department of Public Information was seriously flawed and that these flaws, although subsequently recognized by the Administration, were not retroactively corrected, thus resulting in a continuation of injury to the Applicant;

(c) To find that inadequate consideration was given to the Applicant's eligibility for posts at a higher level and that there was a failure to apply to the Applicant the normal criteria for promotion as a result of the 1988-1989 Professional selection process in the Department of Public Information, in so far as that process operated outside of and in contradiction to the normal promotion process provided for in the Staff Rules;

(d) To decide that, in view of the above, the Applicant should be paid an amount equal to two years of his net base salary, this amount being payable also in the event that the Administrative Tribunal should decide to remand the case back to the Joint Appeals Board."

Whereas the Respondent filed his answer on 26 February 1991;

Whereas the Applicant filed written observations on 30 April 1991;

Whereas, on 15 May 1991, the Tribunal put questions to the Respondent and on 16 May 1991, the Respondent provided answers thereto;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 20 September 1955, as a Clerk at the G-2 level, on a short-term appointment for the duration of the Tenth Session of the General Assembly. On 16 February 1956, he was re-employed as a File Service Clerk for one month, that appointment being converted to a probationary one on 16 March 1956. He resigned on 8 June 1956, having been called to serve in the U.S. Armed Forces. On 5 November 1956, the Applicant was re-employed as a Clerk-Typist at the G-2 level, on another short-term contract for the duration of the Eleventh Session of the General Assembly. On 22 March 1957, he received a three-month fixed-term appointment as a Documents Clerk. His appointment was converted to a probationary one on 1 May 1957, and on 1 January 1959 he received a permanent appointment. Effective 1 January 1963, the Applicant was promoted to the G-4 level. Effective 1 August 1965, he was promoted to the Professional Category at the P-1 level, with the functional title of Assistant Information Officer. On 1 August 1967, he was promoted to Associate Information Officer (Reporter/Writer) at the P-2 level. On 1 June 1970, he became an Information Officer (Reporter/Writer) at the P-3 level, and on 1 April 1973, he was promoted to the P-4 level and designated "Editor".

The Applicant was promoted to the P-5 level on 1 April 1980, with the functional title of Senior Information Officer (Senior Press Officer). On 1 May 1981, he was reassigned within the Division and made Editor-in-Chief of the Yearbook Section. He became Chief of Section on 9 March 1983. Since 10 March 1986, he has been a Senior Information Officer in the Press and Publications Division, Office of the Director, Department of Public Information (DPI).

At its Fortieth Session, in 1985, the General Assembly, by its resolution 40/237, decided to "establish a Group of High-level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations" (the Group of 18). In its report to the General Assembly dated 15 August 1986 (A/41/49, GAOR 41st Session, Supplement No. 49 (1986)), the Group of 18 recommended that: "A thorough review of the functions and working methods as well as of the policies of the Department of Public Information should be conducted, with a view to bringing its role and policies up to date in order to improve the capacity and ability of the Department to provide information on United Nations activities ..." (Recommendation 37(1)). The General Assembly approved this recommendation in its resolution 41/213 of 19 December 1986 and directed the Secretary-General to carry out the reform. In implementing the General Assembly's decision, the Secretary-General also had to take into account Recommendation No. 15 of the Group of 18, concerning the reduction of 15 per cent of "the overall number of regular budget posts" within a period of three years, "particularly in the higher echelons".

During the first quarter of 1987, the Secretary-General appointed a new Under-Secretary-General to head the Department of Public Information. On 23 October 1987, a document entitled "A Plan to Revitalize the Department of Public Information" was submitted to the staff of DPI. On 2 November 1987, the Secretary-General announced to the staff in ST/SGB/Organization/DPI the new organization and functions of the Department.

In a memorandum dated 8 April 1988, the Under-Secretary-General for DPI announced to DPI staff in the Professional levels and above, the procedures to be followed for the selection of staff to fill Headquarters posts at the Professional levels and above under the new staffing table for the Department, which was attached to the memorandum. She stated that the procedures for the reorganization had been approved jointly by the Assistant

Secretary-General, Office of Human Resources Management (OHRM), and herself, following discussions with staff representatives of both Departments, including DPI. In essence, there would be "three rounds of internal DPI advertising for posts at the P-2/1 through P-4 levels, for which only qualified DPI staff [could] apply, and of Secretariat-wide advertising for posts at the P-5 and D-1 levels". The advertising and selection process would commence forthwith.

Also on 8 April 1988, the Director, Committee Liaison and Administrative Services, DPI, informed the Applicant that the post he was currently encumbering was to be discontinued under the revised staffing table. In order to be considered for posts under the revised staffing table, he was required to apply for posts to be advertised. In the first round of the selection process, the Applicant applied for two D-1 posts.

In a memorandum dated 26 August 1988, the Under-Secretary-General for DPI announced the names of staff selected to fill posts circulated in the first round of the staff selection process. The Applicant was not selected for the two D-1 posts for which he had applied, nor was he selected for any other post.

On 2 September 1988, the Applicant, together with six other DPI staff members, requested the Secretary-General to review the administrative decision announcing the results of the first round of the selection process as well as to stay administrative action pending a review. On 14 September 1988, the President of the Staff Committee wrote to the Under-Secretary-General for DPI to express her concern about possible departures from the principle that priority should be given to lateral assignments of staff in the first round of the selection process.

On 28 September 1988, the Assistant Secretary-General, OHRM, informed the Applicant and the other six DPI staff members who had requested review of the decision, that only the first phase of a three-stage selection process had been concluded and that "[t]he two forthcoming rounds of selection for posts at Headquarters together with available UNIC [United Nations Information Centre] posts should provide ample opportunity for the Department to address the concerns [they] raised in [their] letter to the Secretary-General". He further noted that he had requested the Under-Secretary-General for DPI to place "primary emphasis on the lateral

redeployment of staff" and that "the implementation of those decisions which entail promotion to the P-5 level be deferred until phases 2 and 3 of the selection process have been completed, since further adjustments or shifts may be called for at that stage". On 4 October 1988, the Under-Secretary-General for Administration and Management informed the Applicant and the other six DPI staff members of his decision that "it will be in the interest of the Organization and of good administration, that the selection process should move into phases 2 and 3", and that at the end of those phases "a general review of staff, particularly those at the P-5 level, will be undertaken to ensure optimum placement".

On 28 October 1988, the Applicant filed a preliminary statement of appeal with the Joint Appeals Board (JAB) and, on 1 December 1988, he submitted a full statement of appeal against the administrative action of 26 August 1988, announcing the results of the first phase of the selection process, and further requesting that implementation of the administrative decision to move the selection process into phases 2 and 3 be suspended.

The second phase of the selection process was initiated on 8 November 1988, with the circulation of a list of the posts to be filled in that phase. The Applicant did not apply for any of the posts listed. The results of the second round were announced on 8 March 1989. The Applicant was not included among those staff who were selected as a result of the second phase of the selection process. The third phase of the selection process was initiated on 5 May 1989.

The JAB adopted its report on 27 June 1989. Its considerations, conclusion and recommendation read as follows:

> "Considerations
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> 46. The Panel was asked to consider the appellant's allegation that his 'contractual rights' had been violated through the use of an improper staff selection process applied in connection with the restructuring of DPI.
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> 47. The Panel noted that the selection process in question was to be effectuated in three rounds, the first of which had already been completed at the time this appeal was filed, and the second and third of which had not yet been finalized (as of this moment, the second round has been completed).

48. The Panel also noted the appellant continues to serve at his previous level.

49. The Panel observed that under staff regulation 11.1, staff members may appeal 'against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules...'.

50. Based upon the foregoing, the Panel was of the view that the appellant in the present case failed to identify any specific injury which would be appealable under Chapter XI of the Staff Rules. It appeared to the Panel that since the selection process has not yet been completed, the appellant's allegation of injury was premature. In fact, the Panel noted that at this stage it was impossible to determine whether or not the selection process would result in any injury to the appellant.

51. Accordingly, the Panel felt that it was not competent to consider the merits of the case at this point in time, without prejudice to any decision by the Joint Appeals Board to do so at a later stage when and if the appellant is able to demonstrate that his terms of appointment have been affected.

Conclusion and Recommendation

52. The Panel decides that the present case does not fall within its competence and, accordingly, makes no recommendation in support of the appeal."

On 8 August 1989, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had taken note of the Board's conclusion and decision that it was not competent to entertain the appeal.

Also on 8 August 1989, the Under-Secretary-General, DPI, announced to the staff of DPI the results of the third round of the selection process. The Applicant, effective 1 January 1990, was not included among those selected.

On 22 December 1989, the Under-Secretary-General, DPI, assigned the Applicant, effective 1 January 1990, to an extra-budgetary post at the P-5 level with responsibility for a publication entitled "World Statesman". The Applicant declined the assignment and informed the Under-Secretary-General, DPI, of his wish to continue working in the area of computerization of DPI, as it would be in that area that he could, in his judgement, contribute more

effectively to DPI's work. The Applicant subsequently continued working in the area of his expressed preference, i.e., in the area of DPI's computerization, in the Office of the Under-Secretary-General, DPI.

On 30 January 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB erred in deciding that the Applicant's appeal did not fall within its competence.

2. The first phase of the selection process was seriously flawed and these flaws, although subsequently acknowledged by the Respondent, were not corrected retroactively, resulting in a continuation of injury to the Applicant.

3. The selection process in DPI operated outside of and in contravention of the promotion process provided for in the Staff Rules.

Whereas the Respondent's principal contentions are:

1. The right to appeal under the Staff Regulations and Rules is granted to staff in case of alleged non-observance of the staff member's terms of appointment arising from a final decision of the Secretary-General. Staff have no right of appeal unless their terms of appointment are violated.

2. The implementation of the DPI restructuring did not violate the Applicant's rights.

3. The Applicant received full and fair consideration for the posts for which he had applied.

The Tribunal, having deliberated from 15 to 22 May 1991, now pronounces the following judgement:

I. The Tribunal notes that this case is substantively identical to that submitted earlier by a colleague of the Applicant, in respect of whom the Tribunal issued its Judgement No. 511 (Parker) at its last session. Consequently, our conclusions are the same.

II. The Applicant essentially contends that the procedures and decisions taken by the Department of Public Information (DPI) in connection with a reorganization of its structure and functions eroded or violated contractual and other rights as defined in the Staff Regulations and Rules or as deduced from established practice. The Respondent's contention is that everything that the Applicant complains of was done under the authority of the General Assembly and through the legitimate exercise of the Secretary-General's discretionary powers. The JAB, which reviewed the Applicant's complaint in June 1989, considered that, as argued by the Respondent, since only the first phase of the staff reorganization had been undertaken and two more phases were still to come, no specific injury to the Applicant could be identified at that time. The JAB considered that "the appellant's allegation of injury was premature. In fact, the Panel noted that at this stage it was impossible to determine whether or not the selection process would result in any injury to the appellant" (emphasis added). Thus, the JAB itself kept the door open for further consideration and examination and indeed stated specifically in its considerations that the complaint was premature, "without prejudice to any decision by the Joint Appeals Board" to consider the merits of the case "at a later stage". Since the JAB did not reach the question of injury to the Applicant from the administrative decisions which were taken, the Tribunal is unable to deal with that issue at present. However, if there had been improper action which reduced the number of posts potentially available for the Applicant, that might have established injury to the Applicant sufficient to warrant consideration of the merits by the JAB.

III. After the JAB adopted its report on 27 June 1989, two more rounds of selection were undertaken and the process of restructuring DPI was apparently completed. The application to the Tribunal indicates that the issues raised by the Applicant and rejected by the Respondent still need further examination. In particular, the JAB may wish to analyse whether the various administrative measures (eg. action taken at different times by the Under-Secretary-General for DPI in connection with the restructuring of the Department and consequent staff deployment) infringed the "contractual

rights" of staff members; whether the discretion of the Secretary-General, undoubtedly of wide application, was properly exercised; and whether in this instance staff members can legitimately claim that their interests have been adversely affected "as a result of unfair or improper procedures, or the injection of extraneous motives in connection with these procedures" (Judgement No. 412, Gross (1988) para. VI).

IV. In view of the above, the Tribunal remands, as it did in the similar Parker case, the case to the JAB for further review of all of the issues raised by the Applicant, and a subsequent decision of the Respondent.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Samar SEN
Member

Luis de POSADAS MONTERO
Member

Geneva, 22 May 1991

Paul C. SZASZ
Acting Executive Secretary